

Our Ref LAC/SHO/BEN512/1

Your Ref

03 March 2021

**FAO: Head Legal, Democratic & Property Services (Monitoring Officer)**

**Claire Felton**

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Dear Ms Felton

**Our Client: Bentley Paucefoot Parish Council**

**Planning ref: 16/0263**

We have been instructed by the Bentley Paucefoot Parish Council (BPPC) in relation to the Bromsgrove District Council (BDC) planning application ref: 16/0263 and Redditch Borough Council (RBC) planning application ref: 2016/077/OUT regarding Land to the West of Foxlydiate Lane and Pumphouse Lane Bromsgrove.

Based on our initial examination of the background papers received from BPPC the Parish Council has instructed us to give notice that if BDC proceed to issuing a decision notice the decision will be challenged.

The following is the detailed Chronology of events:

22 March 2016	Application validated
2016	First public consultation
9 April 2018	Revised TA submitted.
May 2018	Public consultation of revised documents
<b>14 October 2019</b>	<b>BDC Planning Committee Meeting. Resolved to grant permission</b>
<b>3 November 2019</b>	<b>RBC Planning Committee Meeting. Resolved to defer due to concerns with initial access phasing</b>
15 January 2020	Construction Access Review submitted by Applicant
17 February 2020	Reports submitted by BPPC on <u>11 February 2020</u> finally placed on web page following complaint to Monitoring Officer.
<b>19 February 2020</b>	<b>RBC Planning Committee Meeting. Resolved to grant permission</b>
3 March 2020	BPPC letter to BDC Head of Planning and Regeneration highlighting material planning considerations not addressed.

9 March 2020	BPPC advised application to go before BDC Planning Committee on 06.04.20 (subsequently postponed due to COVID lockdown).
23 March 2020	Response to BPPC letter by applicant's transport consultant (PJA). Includes document 'Site Access Development Triggers' dated 02 November 2018. Document was not in the public domain.
06 April 2020	BDC Planning Committee Meeting to consider phasing changes, WAHT and BPPC submission postponed due to the Covid lockdown
27 July 2020	BPPC advised application to go before a BDC virtual planning committee meeting on 17 August 2020.
12 August 2020	BPPC wrote to BDC Head of Planning pointing out a number of documents missing from the web page
12 August 2020	BPPC submission to application highlights lack of reports from Mott MacDonald and misleading comments by Case Officer
<b>17 August 2020</b>	<b>BDC Planning Meeting Committee postponed</b>
12 August – 21 August 2020	13 additional documents placed on web page from the LHA, Mott MacDonald and WCC Education
<b>22 September 2020</b>	<b>BDC Planning Committee Meeting. Resolved to grant permission.</b>

From the information received we note that if the decision is made it is legally challengeable for the following reasons:

1. Failure to take into consideration material planning consideration contrary to s70 (2) of the Town and Country Planning Act 1990 (as amended) (TCPA)
2. Failure to disseminate the Environmental Information contrary to the EIA Regulations 2004 and Breach of the Local Government (Access to Information) Act 1985
3. Failure to adequately consult the public contrary to Article 34 of the Town and Country Planning (Development Management Procedure) Order 2015

## **Background**

The Foxlydiat Cross Boundary site is designated in Bromsgrove District Council's (BDC's) Local Plan to provide up to 2,800 dwellings for Redditch Borough Council (RBC). A specific policy for the cross boundary sites is included in both the Bromsgrove Development Plan (BDP) and the Borough of Redditch Local Plan (BORLP).

The Planning Application Ref: 16/0263 (the Application) is for hybrid application comprising a detailed application for accesses, the creation of a primary access road etc. and an outline application for up to 2,560 dwellings, first school, retail, health, and community facilities. The Application was submitted in 2016. As part of the land falls within RBC a duplicate application was submitted to RBC (2016/077/OUT). The Authorities share a Planning Department and the case officer.

## **The Applicant's Site Access and Development Triggers Document**

The Applicant's Site Access and Development Triggers Document (the Document) dated 02 November 2018 is an important document as it challenges the phasing proposed by WCC Highways in July 2018. It had a material impact on the proposed phasing as the Local Highway Authority (LHA) changed its advice on phasing to that suggested by the Applicant.

The Document only came to light in March 2020 because BPPC wrote to the Head of Planning and Regeneration detailing concerns that material issues had not been addressed when the application was approved. The Applicant's transport consultant, PJA, compiled a substantial response to this letter. It included the Document and its associated modelling data. The response to the letter was uploaded to the website on **6 April 2020**. The Document was not placed on the Council's Planning Portal as a specific submission until **12 August 2020**, almost two years after its creation.

### **Assessment of Traffic Management Matters**

The BDC's LPA retained Mott MacDonald (MM), a traffic and transport consultancy, specifically to provide the Council with analysis of the Transport Assessments independently of the Local Highway Authority. MM also reviewed the LHA's (WCC Highways) submissions for BDC.

The BDC's Planning Committee Members gave the analysis by MM considerable weight.

The Officer's Report (OR) (at 8.2) for the BDC Planning Committee meeting on 14 October 2019 highlights how the evidence on traffic management issues was scrutinised in detail to ensure its robustness (all emphasis added):

*A detailed Transport Assessment (TA) has been prepared by Phil Jones Associates in support of the hybrid planning application. The assessment process has been lengthy and detailed **to ensure the transportation evidence being used to support this application is robust**. The approach adopted has been a traditional approach with engagement between WCC and BDC **and also the Council retained independent highways consultant, to ensure that the outcomes of the assessment can be appraised fully**. The TA has assessed the impact of development upon the local and strategic highway networks in terms of traffic generation and has also considered the accessibility of the site via alternative modes of travel.*

In the 'Consultations' section of the OR it states:

*Mott MacDonald*

- *No objection*
- *MM on behalf of the Council have been assessing the work done by both the applicants and WCC in relation to the[sic] this scheme, and have published a number of technical notes to support their assessment. The conclusion reached is that there is no transportation reason why this scheme should not be allowed.*

Later in the 'Conclusion on Transportation and Accessibility issues' section (at 08.18 and 08.20) of the OR states:

*Whilst the application is of a significant scale and will result in an increase in movements across all modes of transport, the application accords with the expected quantum of development in the adopted local plan and appropriate mitigation is presented. The access arrangements have been **subject to considerable scrutiny and found to be acceptable** by the County Highway Authority **and the Council's appointed Highway Consultants Mott MacDonald (MM)**. A package of physical works and financial contributions as described by the County Highway Authority are proposed via a legal agreement to ensure any impacts on the network are mitigated.*

*The Highway Authority and Bromsgrove District Councils Highway Consultants – **Mott MacDonald (MM) have independently undertaken a robust assessment of the TA**. Based on the analysis of the information submitted and consultation responses from third parties the Highway Authority concludes that there would not be a severe residual cumulative impact.*

These comments were repeated in the Officer's Report for the RBC Planning Committee Meetings in November 2019.

The RBC Planning Committee deferred their decision in November 2019 due to concerns over the proposed construction access phase using Foxlydiate Lane. The application went back before the RBC Planning Committee in February 2020 to consider new construction access phasing. In addition to the OR some further updates were issued.

In Update 1 issued on 18 February 2020 (the day before the meeting), the planning conditions for the phasing were updated. There was also a copy of WCC Highway's response to BPPC's email of 7 February. Paragraph 2 of their response includes the statement: '*....additionally it has been reviewed by Mott MacDonald on behalf of Bromsgrove District Council...*'

Following this are "*Officer comments in response to Bentley Pauncefoot Representations*"

*The technical submissions made to BDC/RBC for the hybrid applications have been scrutinised by highways officers at Worcestershire County Council and by independent transport consultants (Mott MacDonald) acting on behalf of Bromsgrove District Council. There are no outstanding technical objections and neither WCC Highways or Mott MacDonald deem there to be a severe impact on the local highway network.*

Update 2, issued on the day of the meeting, 19 February 2020, included a representation by BPPC requesting clarification of points regarding the phasing published the day before. The Officer's response to three of the questions is unequivocal:

- 7. There is no objection from the Highway Authority or BDC's Highway Consultant in this respect.*
- 8. There is no objection from the Highway Authority or BDC's Highway Consultant in this respect.*
- 9. There is no objection from the Highway Authority or BDC's Highway Consultant in this respect."*

Neither BDC nor RBC Planning Committee Members would have had reason to doubt the statements in the Officer's Report, but the comments made were not factually correct.

Immediately prior to the application going before BDC Planning Committee for the first time in October 2019, as stated above, the Local Highway Authority (LHA) submitted a document significantly changing the phasing of accesses and the trigger points for contributions. There had been no indication that the phasing would change from that proposed in the LHA's submission of July 2018.

MM's Technical Note 28 August 2019 (just prior to the original date for the application going before BDC's Planning Committee 14 October 2019) provides a comprehensive summary of all the documents reviewed by them and submitted by them. It confirmed that the last LHA document they reviewed was the original submission dated 27 July 2018. No reference was made to the applicant's subsequent document of 2 November 2018 nor the LHA's revised document of September 2019.

This meant that the phasing for the creation of the accesses and spine road, together with the trigger points for off-site road mitigation, detailed in the OR for both BDC and RBC Planning Committees to consider, with the recommendation to 'Grant', had never, in fact, been seen by MM. There had been no scrutiny or robust assessment contrary to the statements in the OR.

Members were given factually incorrect information in the OR. It confirmed erroneously that the key parts of the detailed element of the planning application had been fully checked to be safe and policy compliant by the Council's own consultants employed specifically to check the transport elements and the assessment by the LHA.

Following approval of the application by RBC's Planning Committee in February 2020, BPPC wrote to the Head of Planning and Regeneration on 3 March stating that BPPC believed matters material to the planning application had not been fully considered. BPPC pointed to a lack of evidence and errors in information. The LPA clearly considered these points valid as a decision was announced to put the application back before BDC's Planning Committee, in part to address the points in BPPC's letter, on 6 April 2020. This meeting was cancelled due to the COVID lockdown and was rescheduled to go to the Planning Committee on 17 August 2020.

It was only when the Applicant's transport consultant responded to BPPC's document in late March 2020 that the Document dated 2 November 2018 together with further modelling came to light. This was the first time that BPPC had seen the Document as it had not been placed in the public domain as explained above.

It was necessary for BPPC to write to the Council again following publication of the OR for the re-scheduled BDC planning committee meeting on 17 August 2020. The Parish Council informed the LPA that the Document together with further background documents were missing from the web page and other background documents were on an incorrect web page. BPPC also pointed out that no evidence had been provided to show that MM or the LHA had reviewed key documents. BPPC further challenged the assertion that all BPPC submissions had '*been scrutinised*' and '*subject to detailed discussion*' by both MM and the LHA when no evidence of this had been provided. The meeting was delayed for MM and WCC Highways to comment on the documents.

The OR for the delayed BDC Planning Committee meeting on 22 September 2020 was updated and revised slightly to include these submissions but it was not made clear that the phasing for the site accesses – approved by the BDC Planning Committee in October 2019 – had not, in fact, been scrutinised by MM as claimed in the earlier OR.

At no point was it made clear to Committee Members or the public that the original OR had been misleading. On the contrary, Members were reminded, both in the conclusion of the OR (at 7.43) and verbally, that they had previously resolved to approve the substantive proposal and that the application had now been approved by RBC even though that decision had been made based on misleading information. The officers further failed to disclose the fact that the RBC Planning Committee had not had the knowledge of the new information.

As a consequence, the LPA has misled both BDC and RBC's Planning Committees by stating that their transport consultant had scrutinised the transport elements of the planning application - the most important material consideration for the detailed element of the planning application. This misleading claim was made a number of times throughout the OR and in answers to BPPC.

### **Legal principles:**

- 1. Failure to take into consideration material planning consideration contrary to s70(2) of the Town and Country planning Act 1990 (as amended) (TCPA)*

The starting point for the determination of planning applications is the development plan. Section 70(1) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that a local planning authority (LPA) may grant planning permission unconditionally or subject to such conditions as it thinks fit. Section 70(2) of the TCPA 1990 provides that in determining an application for planning permission, the LPA 'shall have regard to the provisions of the development plan, so far as material to the application, and to **any other material consideration**'

Whether or not a particular factor is capable of being a material consideration is a matter of law albeit that its factual context and weight are matters for the decision-maker.

It is evident from the factual background that the Document relates to the traffic access management system of the proposed development. This was and is the main issue to be dealt with for this Application. This document and the information in it, clearly serves planning purpose and fairly and reasonably relates to the development<sup>1</sup>. The document is therefore a material planning consideration. It is also one of the main reasons why the BDC took the matter back to the BDC's planning committee.

However, the RBC planning authority failed to take the matter back to the RBC's planning committee. As a consequence, when the RBC members resolved to grant, they did not have regard to the material consideration making the decision contrary to Section 70(2) of the Act.

No corrections was made by the officers including the Council's legal advisor, as to the incorrect statement in the OR.

## 2. *Failure to disseminate Environmental Information*

Planning applications are environmental matters. The Environmental Information Regulations 2004 (EIR) require public authorities to provide the public with access to environmental information that they hold. Regulation 4(1) of Part 2 of the EIR states: '*a public authority shall in respect of environmental information that it holds—(a) progressively make the information available to the public by electronic means which are easily accessible; and (b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information*'.

It is evident from the background of the matter that the LPA failed categorically to disseminate the information contrary to the EIR requirements. In particular, most salient documents were not on the Councils planning portal until the Council disseminated the information between 12.8 and 21.9.2020, well after the RBC planning committee. As a consequence the RBC's planning committee, BPPC and the public were not aware of the document and could not comment on it or take it into consideration at the time of the decision making process.

## 3. *Failure to adequately consult the public*

It is evident that RBC failed to allow for adequate public consultation prior to the February 2020 Planning Committee meeting in accordance with Article 34 of the Town and Country Planning (Development Management Procedure) Order 2015 which states (emphasis added):

- (9) A local planning authority must **not determine an application** for planning permission where any notice of, **or information about**, the application has been—
  - (f) published in a newspaper or a website under article 15 within the period of 14 days [*NB. temporarily amended under The Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (Coronavirus) (Amendment) Regulations 2020 to be 21 days*] beginning with the date on which the notice or information was published.
- (9A) For an EIA application accompanied by an environmental statement a local planning authority must not determine an application for planning permission where any notice of, **or information about**, the application has been—
  - (b) published in a newspaper under article 13 or 15 or on a website under article 15, within the period of 30 days beginning with the date on which the notice or information was published.

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<sup>1</sup> The Supreme Court considered the meaning of "material considerations" in [R. \(Wright\) v Resilient Energy Severdale Ltd \[2019\] UKSC 53; \[2019\] 1 W.L.R. 6562](#)

The decision is legally flawed and the BPPC considers that any grant of planning permission pursuant to the RBC members' resolution would be unlawful for the reasons set out. The BPPC invites the Council to reconsider its position prior to the grant of any planning permission with a view to resolving the issue in consultation with the BPPC. Otherwise, the BPPC would be left with no option but to challenge any grant of planning permission by way of a claim for judicial review if a decision is issued.

The issues raised above are not necessarily comprehensive and therefore the BPPC reserves the right to present further matters as and when they arise.

Yours sincerely



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